Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CAROLYN C. LOPEZ,
*Petitioner,*

v.

WILLIAM J. HENDERSON,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether an employee may show adverse action other than termination, demotion, or denial of promotion to make a prima facie case of race or gender discrimination, or retaliation, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

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On Petition for Writ of Certiorari to the
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# PETITION FOR WRIT OF CERTIORARI

Carolyn C. Lopez, Petitioner, respectfully prays that the Supreme Court of the United States issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 27, 1999.

## OPINION BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion in this case on July 27, 1999. (Appendix B.)

## JURISDICTION

The jurisdiction of this Court to review the Fifth Circuit's judgment by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964,
78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

## STATEMENT OF THE CASE

### A. Procedural History

This case involves race and gender discrimination and retaliation. Petitioner is a Hispanic-surnamed Anglo female who was a rural postal carrier in the Texas Rio Grande Valley, an area predominated by Hispanics, for more than 15 years with an assignment of "Route 2, Mercedes, Texas." The complaint alleged claims against, inter alia, Respondent William J. Henderson (substituted for Marvin Runyon) under Title VII for discrimination based on race and gender, and for retaliation for making

the complaints. The facts that underlie this case prompted two separate lawsuits in the district court, which were later consolidated.

Respondent filed a motion for summary judgment, arguing: (1) Using the test devised in *Dollis v Rubin*, 77 F.3d 777 (5th Cir. 1995), and *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), petitioner did not allege any adverse employment action; and (2) Any action taken against petitioner by respondent was based upon a legitimate, non-discriminatory reason. The district court granted respondent's motion on December 4, 1997, and entered final judgment on April 1, 1998.

Petitioner appealed. On July 27, 1999, a panel of the United States Fifth Circuit Court of Appeals, relying on its own precedents, affirmed the trial court, and held that: (1) petitioner did not make out a case for race or gender discrimination because she alleged no adverse action, other than reduction in route mileage; and (2) petitioner failed to disprove respondent's asserted reason for the mileage reduction or that the reduction was retaliatory.

**B. Statement of Facts**

Petitioner was assigned to Route 2, Mercedes, Texas, as a Rural Mail Carrier, after having successfully bid for this route some 15 years ago. On or about October 12, 1988, following a national holiday, petitioner twice requested either assistance or a curtailment in the volume

of mail to be delivered due to the heavy load (called a request for auxiliary assistance); both requests were denied. However, under similar circumstances, a male employee, Nick Johnsey, was given assistance by another employee. As a result of this disparity, petitioner filed an Equal Employment Opportunity ("EEO") complaint, alleging discrimination based upon race and gender. Prior to a hearing before an Administrative Law Judge, the parties settled the complaint. The settlement provided that if a rural carrier was running 20 minutes later than the normal departure time, assistance would be given. Such settlements are binding on both parties, pursuant to the Code of Federal Regulations.

Despite voluntarily entering into this agreement in 1991, Robert Pantoja, the local postmaster, routinely breached and disregarded it. On September 10, 1993, Pantoja refused to abide by the agreement when he again denied assistance to petitioner. This prompted another EEO complaint by petitioner. Ronnie Blumenthal, Director of Federal Operations for the Equal Employment Opportunity Commission, issued a decision on February 15, 1994, which found that the settlement agreement had been breached by the Postal Service, and Blumenthal ordered the Service to take corrective action.

On May 5, 1994, petitioner notified Antonio Echavarria, her supervisor, of her need for assistance pursuant to the settlement agreement. Echavarria denied her assistance, and indicated that none would ever be offered. On

May 27, 1994, petitioner received notice that the Service intended to nullify the agreement. Petitioner appealed this decision, and in July 1994 received notice that no further action to set aside the agreement would be taken at that time. Again in February 1995, the day after a national holiday, petitioner requested assistance due to an excessive volume of mail, and again Echavarria denied it. However, another rural carrier, a Hispanic male, did receive assistance. Petitioner filed another EEO complaint.

On October 23, 1993, the Postal Service placed a warning letter concerning attendance in petitioner's personnel file. After yet another successful EEO complaint by petitioner, it was ordered removed. The settlement terms called for it to be removed by January 1, 1994. However, it was still present on March 23, 1994. Only after threatening suit did the Service finally remove the letter.

On or about March 23, 1994, the Postal Service issued another warning letter to petitioner. When petitioner questioned Echavarria about the letter, he refused to disclose the author. He said the real reason for the letter was because of some "laughter" directed at him. When petitioner documented that another employee, Jack Bowlsby, had used more leave time, had more absenteeism, and had multiple days of leave without pay, all without a letter of warning being issued, Echavarria rebuffed her. Postmaster Pantoja refused to discuss the

discrepancies of the treatment between her and the male, Bowlsby, simply saying, "It was different." Petitioner filed another EEO complaint. Ultimately, after petitioner was forced to fight the discrimination and retaliation in an appeal, the letter was removed from her file.

In 1993, petitioner was treated differently than other employees when she had a vehicular breakdown. In early September 1993, Bowlsby's vehicle broke down and a substitute was called in to assist him. Bowlsby was not charged annual leave and the Postal Service paid the substitute. When petitioner's vehicle broke down, the response was different. Echavarria told petitioner, "Who is going to pay the substitute?" Petitioner ultimately paid the substitute mail carrier out of her pocket, and she was docked a day of annual leave. Allegedly, Echavarria later established a new policy of docking the carriers a full day. However, when carrier Steve Cabrera's vehicle broke down on or about October 17, 1994, he was not docked for the day, nor did he have to pay the substitute out of his own pocket. Cabrera is Hispanic.

Petitioner filed another EEO complaint on or about December 21, 1993, alleging that she was discriminated and retaliated against due to race, gender, and prior EEO activity. After settlement attempts were unsuccessful, the Postal Service issued a right to sue letter to petitioner on April 6, 1995. Petitioner later filed two suits: M-95-CV-13 (RHH) was filed in the Southern District of Texas, McAllen Division, on January 12, 1995, and M-95-CV-96

(RHH) was filed in the Southern District of Texas, McAllen Division, on April 20, 1995. These two suits were combined into M-95-CV-13 by an order dated July 10, 1995.

After petitioner filed the suits, four miles were removed from her rural route, significantly affecting her income. A supervisor, Adam Flores, told petitioner that she was denied "the noon dispatch" or "4 Mile" part of her route on May 6, 1993. This was done immediately after he denied five grievances in a "Pre-D" (an administrative pre-disciplinary proceeding). Despite this action, petitioner kept the "noon dispatch" or "4 mile" assignment until spring 1995. At that time, Pantoja informed petitioner that the additional route was being taken from her. No Hispanic or male suffered the same loss of mileage or reduction in pay. Pantoja told petitioner that two visiting inspectors, "Clyde" and "T.W.," were responsible for the cutback. After another Anglo suffered the same cutback, petitioner asked the inspectors about the route reductions. Both inspectors denied the responsibility attributed to them by Pantoja, and stated that petitioner had an excellent discrimination claim against the Postal Service and her superiors.

Postal carriers are evaluated according to mileage, the number of mail boxes on route, and mail volume. Evaluations affect compensation. When petitioner's mileage was reduced, the result was to increase the stress of performance by requiring her to deliver the same

volume of mail (on average) to the same mail boxes in 48 fewer minutes a week. After he was confronted with such evidence, Pantoja issued a backdated memorandum to justify his conduct. Pantoja prevailed upon Ralph Barnard, Manager of Operations and Program Support, San Antonio District, to send a memo ostensibly dated April 25, 1995, yet sent out on May 31, 1996, which supported the decision. Finally, when petitioner was diagnosed with a debilitating medical condition, Pantoja and/or Echavarria contacted petitioner's doctor without her consent. Echavarria's continual phone calls to petitioner's doctor, questioning his medical diagnosis, led to the doctor discontinuing his treatment of petitioner.

**C. Basis for Federal Jurisdiction in the District Court**

The district court had subject matter jurisdiction of this case under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, and 28 U.S.C. § 1331.

## REASON FOR GRANTING THE PETITION

**Under *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), an employee may show adverse action other than termination, demotion, or denial of promotion to make a prima facie case of race or gender discrimination, or retaliation, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.***

### A. *Ellerth*: "Tangible employment action" resulting in an "economic injury."

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), this Court clarified the jurisprudence regarding Title VII by holding that when an employee suffers a "tangible employment action" from a supervisor's sexual harassment, the employer may be held vicariously liable, but if no tangible employment action occurs, the employer may raise an affirmative defense to liability or damages.

However, the question remains: What constitutes a "tangible employment action"? The uncertainty as to the meaning of this phrase has resulting in widely differing interpretations and uncertainty in the circuit courts. Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears*, NAT'L L.J., Nov. 9, 1998, at A01 (noting uncertainty whether "tangible economic harm" extends beyond

firing, demotion, or job transfer).

Title VII states a broad mandate prohibiting discrimination in employment:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Title VII also forbids an employer from retaliating against an employee for engaging in activity protected by Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because

> he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

In *Ellerth*, this Court held that proof of an "ultimate employment decision" is no longer required to show discrimination. Rather, a Title VII plaintiff must show a "tangible employment action" resulting in an "economic injury." *Ellerth*, 118 S. Ct. at 2268. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, . . . a decision causing a significant change in benefits[,] . . . a demotion evidenced by a decrease in wage or salary, a less distinguished title, . . . significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* (emphasis added).

**B. The Fifth Circuit: "Adverse Action" From "Ultimate Employment Decisions."**

In the case sub judice, petitioner alleges the following tangible employment actions: (1) denial of auxiliary assistance, (2) breach of a settlement agreement, (3) refusal to pay compensation to a substitute carrier

following a vehicular breakdown, (4) a four-mile reduction in route mileage, and (5) unconsented communications with petitioner's physician, resulting in lost medical care.

Referring to its own precedent, the Fifth Circuit held that, with the exception of the reduction in route mileage, none of the detriments suffered by petitioner constitute "adverse action" because adverse action is limited to an "ultimate employment decision." *Lopez v. Henderson*, No. 98-40686, slip op. at 11 n.14, n.16 (5th Cir. July 27, 1999) (per curiam) (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997)).

Since the issuance of *Ellerth*, the Fifth Circuit, in this case and others, has pondered whether *Ellerth* "lowers the bar" for what constitutes adverse action. *See Lopez*, slip op. at 12 n.17 (considering whether *Ellerth* "lowers the bar" regarding that which qualifies as an adverse employment action) (internal quotation marks omitted); *Watts v. Kroger Co.*, 170 F.3d 505, 511 n.5 (5th Cir. 1999) (mulling whether *Ellerth* "lowers the bar as to what qualifies as an adverse employment action"). Yet, each time the Fifth Circuit ponders this question, the outcome has been the same: Stubborn application of its own worn precedent and affirmance of summary judgment for the employer because the detriment suffered by the employee was not an "ultimate employment decision."

In other words, if *Ellerth* said lower the bar, the Fifth Circuit refuses to move it.

The Fifth Circuit is not alone. Other circuits have refused to widen the realm of detriments to employees that can be considered "tangible employment actions." *See, e.g., Mikels v. City of Durham*, No. 96-2560, 1999 WL 437248, at *8-*9 (2nd Cir. June 29, 1999); *Boone v. Goldin*, No. 98-2085, 1999 WL 308606, at *2 (4th Cir. May 17, 1999); *Adusumilli v. City of Chicago*, 164 F.3d 353, 364 (7th Cir. 1999). At the same time, other circuits have followed the imperative from *Ellerth* and have broadened the definition of actionable conduct. *See, e.g., Kimbrough v. Loma Linda Dev., Inc.*, No. 98-2630 WM and 98-2631 WM, 1999 WL 437248, at *2 (8th Cir. July 9, 1999); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 52 (1st Cir. 1999); *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 975 (9th Cir. 1999).

This Court should grant this petition for writ of certiorari because, in light of the standard announced in *Ellerth*, the Fifth Circuit's application of the law was faulty. All of the conduct alleged by petitioner is tangible employment action. The denial of auxiliary assistance is an "indice[] . . . unique to a particular situation" (*Ellerth*, 118 S. Ct. at 2268) — that is, it was very difficult for petitioner to carry out her job responsibilities without the assistance. The Postal Service's refusal to pay compensation to a substitute carrier following the breakdown of petitioner's truck resulted in an economic detriment to

petitioner. Echavarria's continual phone calls to petitioner's doctor, questioning his medical diagnosis, led to the doctor discontinuing his treatment of petitioner for a degenerative nerve disease in her arm. This was "a decision causing a significant change in benefits." *See Ellerth*, 118 S. Ct. at 2268.

## CONCLUSION

This Court should grant this writ of certiorari because the Fifth Circuit has rendered a decision on an important matter in conflict with *Ellerth* and the decisions of other circuits. Therefore, this proceeding involves a question of exceptional importance. This Court should take this opportunity to clarify the meaning of what constitutes "tangible employment action" under Title VII.

As the circuit courts apply this Court's pronouncements in *Ellerth* to various fact situations, it is critical that this Court continue to direct the courts below to follow congressional intent, not activist agendas. After *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), some circuits strayed so far from the path laid out by this Court that we moved backward, not forward, in advancing civil rights. This Court can prevent this from happening again by reversing the Fifth Circuit, and setting forth clear principles regarding actionable conduct under Title VII.

Carolyn C. Lopez, Petitioner, respectfully requests that this Court grant her petition for writ of certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

| | | |
|---|---|---|
| CAROLYN LOPEZ | ) | |
| | ) | CIVIL ACTION NUMBER |
| v. | ) | M-95-013 |
| | ) | |
| MARVIN RUNYON ET AL., | ) | |

JUDGMENT

On the 4th day of December, 1997, came on to be heard the Defendant's "Second Motion for Summary Judgment" and the Court granted said Motion for the reasons stated on the record. It is, therefore,

ORDERED, ADJUDGED, and DECREED that Defendant's "Second Motion for Summary Judgment" is hereby Granted and that this case is DISMISSED with prejudice.

The Clerk shall send a copy of this Order to counsel for the parties.

DONE this 1st day of April, 1998, at McAllen, Texas.

Ricardo H. Hinojosa

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

**APPENDIX B**

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

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No. 98-40686
(Summary Calendar)

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CAROLYN C. LOPEZ,

Plaintiff-Appellant,

VERSUS

WILLIAM J. HENDERSON, Postmaster General,
United States Postal Service; ET AL.,

Defendants,

WILLIAM J. HENDERSON, Postmaster General,
United States Postal Service,

Defendant-Appellee.

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Appeal from the United States District Court
For the Southern District of Texas
M-95-CV-13
M-95-CV-96

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Before JOLLY, SMITH, and WEINER, Circuit Judges.

PER CURIAM*

Plaintiff-Appellant Carolyn C. Lopez appeals the district court's grant of summary judgment in favor of Defendant-Appellee William J. Henderson, Postmaster General of the United States Postal Service. The district court rejected Lopez's allegations of racial and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Agreeing de novo with the district court, we affirm.

I.

FACTS AND PROCEEDINGS

Lopez is a white woman who was employed by the United States Postal Service as a rural letter carrier with the Mercedes, Texas post office. Lopez claims that the Postal Service treated her differently on the bases of her race and her sex. She further asserts that the Postal Service retaliated against her for filing charges of discrimination based on these alleged incidents. Lopez grounds these claims on the incidents described below.

A. Lopez's Disparate Treatment Claims

1. Denial of auxiliary assistance and breach of settlement agreement

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Lopez states that she was denied auxiliary assistance[1] on three occasions over several years because she is a white woman. Lopez first made, and was denied, a request for auxiliary assistance in October of 1998. In August of 1990, Lopez filed an EEO complaint, alleging discriminatory treatment because a male letter carrier had, under similar circumstances, requested assistance in January of 1990, and, unlike her, had received it. This particular dispute was resolved in a settlement agreement entered into between Lopez, her supervisor, Antonio Echavarria, and the Mercedes Postmaster, Robert Pantoja.

In September of 1993, Lopez again asked for auxiliary assistance, and again her request was denied. Alleging that the Postal Service was in breach of the settlement agreement, Lopez filed a notice of the breach with the Postal Service in October of 1993, claiming discriminatory treatment. The Postal Service, in November of 1993, declined to reinstate her original August 1990 complaint. On Lopez's appeal, the EEOC, in February of 1994, ordered that the Postal Service comply with the settlement agreement.

In February of 1995, Lopez once again requested, and was again denied, auxiliary assistance. She requested EEO counseling, and received notice of the right to file in April of 1995. She filed an EEO complaint that same month, and the Postal Service dismissed the complaint in June 1995, noting that Lopez already made this complaint the subject matter of a district court action.

2. Letters concerning attendance

Lopez also claims that the Postal Service's placing in her

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[1] On days when a mail carrier has an excessive volume of mail to deliver, the carrier may request assistance before departing on his route. In the Postal Service, this is called a request for auxiliary assistance.

personnel file of warning letters concerning her attendance constituted discriminatory treatment on the bases of her race and her sex. In September of 1993, the Postal Service placed Lopez on restricted sick leave, meaning that if she took sick leave she was required to provide proof that she had visited a doctor. According to the Postal Service, Lopez regularly took leave just before and just after weekends and holidays. In October of 1993, Pantoja issued Lopez a warning concerning her irregular attendance because, despite the restriction, she had continued to take sick leave immediately preceding and following weekends. Lopez sought EEO counseling in November of 1993, and, in December of 1993, the EEO issued Lopez a notice of right to file, which she did. In accordance with a settlement agreement between the Postal Service and the National Rural Letter Carriers Association, the Postal Service removed the warning letter from Lopez's personnel file. After the removal of the letter, the Postal Service dismissed the EEO complaint on the basis of mootness. Lopez did not appeal to the EEOC.

According to the Postal Service, Lopez continued to take sick leave immediately before and after weekends and holidays. Pantoja issued Lopez another warning letter in April of 1994, and Lopez again sought EEO counseling. In June of 1994, she received notice of her right to file an EEO complaint. She did so, and in response, the Postal Service removed the letter from her personnel file. The Postal Service subsequently dismissed the EEO complaint, and again Lopez did not appeal to the EEOC.

3. Payment of compensation to a substitute carrier following vehicular breakdown

Lopez also contends that she was treated differently from other employees when she had a vehicular breakdown. Specifically, Lopez claims that the Postal Service did not inform her that she need not compensate a substitute carrier

directly when her own vehicle broke down, as the substitute carrier would be paid through the payroll system. When Lopez's vehicle broke down in October of 1993, a substitute was called in to complete the route. The Postal Service paid the substitute for the day, and deducted a day of annual leave for Lopez. Lopez sought EEO counseling later that month, claiming that a male letter carrier had suffered a vehicular breakdown in September of 1993 but had not been required to compensate his substitute. Lopez received notice of her right to file a complaint, and did so with the Postal Service in December of 1993. The Postal Service denied the claim in April of 1995, and Lopez did not appeal to the EEOC.

B. Lopez's Retaliation Claims

1. Four-mile mileage reduction

Lopez alleges that the Postal Service reduced her daily mileage by four miles in retaliation against her for filing the foregoing EEO complaints. As compensation for rural route carriers is determined by a formula that includes mileage, this reduction adversely affected Lopez's pay.

Before the spring of 1995, the Postal Service required all Mercedes rural carriers to return to the station during the noon hour to drop off the outgoing mail that they had picked up during the morning. This outgoing morning mail was then forwarded to the McAllen, Texas station during the noon hour so that the mail processing machinery at the McAllen station would have a sufficient volume of mail to keep those machines operating throughout the day.

According to the Postal Service, however, in the spring of 1995, the mail volume in McAllen proper had grown sufficiently large that noon forwarding of the Mercedes morning mail was no longer needed to keep the McAllen machines in constant use. Accordingly, the Postal Service stopped requiring Mercedes rural carriers to return to the station at noon to

drop off outgoing mail, and this resulted in a reduction in mileage for all such carriers. As an exception, the Postal Service did permit one carrier to continue making a noon drop-off during the winter season because the volume of outgoing mail he picked up in the morning during that season was so great that he could not see out of the rear of his vehicle. Despite the Postal Service's contention that, except for that single carrier, the mileage reduction affected all rural carriers equally, Lopez insists that she was the only employee who suffered a loss of mileage or reduction in pay. Lopez did not file an EEO complaint regarding this matter.

2. Communications with physician

Lopez also claims that, in retaliation for her filing of the EEO complaints, Pantoja and Echavarria called her doctor without her permission. She alleges that these calls prompted her doctor to discontinue treating her.[2]

C. Procedural History

The facts underlying this matter produced two separate lawsuits in the district court, which were later consolidated. Lopez first filed suit in the United States District Court for the Southern District of Texas, McAllen Division, in January, 1995. She filed a second suit in the same district court in April of that year. The court consolidated these two cases in July. The Postal Service moved for summary judgment. The district court granted the motion and entered a judgment dismissing Lopez's case in April, 1998. Lopez timely filed a notice of appeal.

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[2] In 1996, Lopez was allegedly diagnosed with lateral epicondylitis, a soreness in her right arm. Lopez went through the worker's compensation process and received documentation showing she could not perform repetitive motions.

## II.

## ANALYSIS

### A. Standard of Review

We review a district court's grant of summary judgment de novo.[3] Summary judgment is appropriate if the record, when viewed in the light most favorable to the non-moving party, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[4] In this employment discrimination case, our focus is on whether there exists a genuine issue of material fact regarding intentional discrimination by the Postal Service against Lopez.[5]

### B. Merits

We determine whether a genuine issue of material facts exists as to Lopez's disparate treatment and retaliation claims

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[3] Lawrence v. University of Texas Medical Branch at Galveston, 163 F.3d 309, 311 (5th Cir. 1999).

[4] FED. R. CIV. P. 56(c).

[5] See Lawrence, 163 F.3d at 312; Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir. 1996).

by resorting to the same evidentiary framework.[6] The burden-shifting structure applicable to Title VII disparate treatment is equally applicable to Title VII unlawful retaliation cases.[7] As Lopez has not proffered any direct evidence of discrimination, she must show such discrimination indirectly.[8] First, Lopez must establish a prima facie case.[9] To establish a prima facie case of disparate treatment, Lopez must show that (1) she was a member of a protected class under Title VII; (2) her performance of the elements necessary for her job were satisfactory; (3) she was subjected to an adverse employment action; and (4) others similarly situated were more favorably treated.[10] To establish a prima facie case of retaliation, Lopez must demonstrate that (1) she engaged in an activity protected by Title VII; (2) she was subject to an adverse employment action; and (3) there is a causal link between the adverse employment action

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[6] Because we subject this case to this form of analysis, and conclude that Lopez did not raise a genuine issue of material fact as to her disparate treatment and retaliation claims, we need not address the Postal Service's contention that summary judgment was proper because, as to each of her claims, Lopez had either failed to exhaust her administrative remedies or the claim was moot. Although the Postal Service raised this issue in the district court in its motion for summary judgment, the district court did not grant the motion on these grounds. For purposes of our analysis, we assume, arguendo, that, as to each of her claims, Lopez exhausted her administrative remedies and that none of her claims was moot.

[7] Long, 88 F.3d at 304.

[8] See Lawrence, 163 F.3d at 312.

[9] Id.; Long, 88 F.3d at 304.

[10] See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 802 n.13 (1973); Urbano v. Continental Airlines, 138 F.3d 204, 206 (5th Cir. 1998).

and the protected activity.[11]

If Lopez successfully establishes a prima facie case, the defendant -- the Postal Service -- must articulate legitimate, non-discriminatory or non-retaliatory reasons for the challenged employment actions.[12] If the Postal Service successfully articulates such reasons, the inference of discrimination raised by the prima facie case disappears, and Lopez must prove, by a preponderance of the evidence, that the reasons articulated by the Postal Service are pretextual and that the Service intentionally discriminated.[13]

In the instant case, all but one of Lopez's claims clearly do not involve occurrences that rise to the level of "adverse employment actions." Therefore, Lopez could not establish a prima facie case on these claims. "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate employment decisions."[14] "[E]mployment actions are not adverse actions where pay, benefits, and level of responsibility remain the same."[15] We have previously noted that "[u]ltimate employment decisions include acts such as hiring, granting leave, discharging, promoting, and compensating".[16] Here, all of the Postal Service's alleged transgressions relating to Lopez's

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[11] Burger v. Central Apartment Management, Inc., 168 F.3d 875, 878 (5th Cir. 1999).

[12] See Lawrence, 163 F.3d at 312; Long, 88 F.3d at 304-305.

[13] See Lawrence, 163 F.3d at 312; Long, 88 F.3d at 305.

[14] Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995).

[15] Watts v. Kroger Co., 170 F.3d 505, 512 (5th Cir. 1999).

[16] Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (citation and internal quotation omitted).

disparate treatment claims -- its refusal to grant Lopez's requests for auxiliary assistance, its alleged breach of the 1991 settlement agreement, its decision to issue letters of warning concerning Lopez's attendance, and its treatment of Lopez in relation to her vehicular breakdown -- were not adverse employment actions. Neither was the placement of telephone calls to Lopez's doctor by her supervisors, allegedly in retaliation for her filing of discrimination complaints. As such, Lopez could not establish a prima facie case on these claims, so summary judgment was proper.[17]

We thus need only address Lopez's one remaining claim, that the Postal Service reduced her mileage in retaliation for filing discrimination complaints. Even assuming, without deciding, that the Postal Service's reduction of Lopez's mileage constituted an adverse employment action and that Lopez properly established a prima facie case of retaliation on this claim, the Postal Service proffered a legitimate, non-retaliatory reason for the action it took, and Lopez failed to create a genuine issue of fact that the Postal Service's reason was pretextual or that the Service unlawfully retaliated against her.[18] According to the Postal Service, it eliminated the noon

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[17] Lopez contends that the district court erred in determining that she had not established a prima facie case because it employed a standard rendered obsolete in light of the Supreme Court's decision in Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), a sexual harassment case. In Ellerth, the Supreme Court noted that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Id. at 2268. We need not reach this issue in the instant case, however. Even if Ellerth "lowers the bar" regarding that which qualifies as an adverse employment action, Lopez's disparate treatment claims and retaliation claim regarding the placement of calls to her doctor do not, in any event, satisfy the Ellerth definition of a tangible employment action. See Watts, 170 F.3d at 512 n.5.

[18] See Long, 88 F.3d at 308.

hour dispatch for all rural carriers (except for the one who collected so much mail in the morning during the winter season that he could not see out of the back of his vehicle) because it was no longer necessary. The non-retaliatory reason advanced by the Postal Service is that, by 1995, there was such a volume of mail generated in McAllen proper that additional mail from Mercedes was no longer needed just to keep the McAllen machines running full time.

In light of the Postal Service's proffered legitimate, non-discriminatory reason, Lopez had to raise a genuine issue of fact as to whether the Postal Service unlawfully retaliated against her.[19] This she has not done. Even if Lopez had shown that the Postal Service's proffered reason was pretextual, (which she has not shown), she would still have to show that the Postal Service intentionally discriminated against her on the basis of her race or sex.[20] A plaintiff's evidence of pretext must create an inference of discrimination.[21] To create a jury question, Lopez's evidence must be "substantial".[22] In the instant case, Lopez proffered no evidence that raises even an inference of pretext or of retaliatory motive on the part of the Postal Service. Alone, Lopez's subjective belief that she was retaliated against because she is a white female is not

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[19] Long, 88 F.3d at 308.

[20] See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514-16, 519 (1993). In Hicks, the Supreme Court noted that "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

[21] See Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994-95 (5th Cir. 1996) (en banc).

[22] See id., at 993.

sufficient to raise such an inference.[23] Absent evidence of retaliatory motive, Lopez has failed to raise the requisite material issues of fact concerning Postal Service retaliation against her to warrant a trial. Consequently, summary judgment for the defendant on this retaliation claim was proper.

## III.

## CONCLUSION

On the strength of our de novo review of the summary judgment record, we agree with the district court and conclude that it did not commit error by granting the Postal Service's motion for summary judgment. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[23] See Lawrence, 163 F.3d at 313 (quoting Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983) ("[A] subjective belief of discrimination, however genuine, [may not] be the basis of judicial relief.").